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ORIGINAL

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202) 424-7500
FACSIMILE (202) 424-7645
WWW.SWIDLAW.COM

WILLIAM L. FISHMAN
DIRECT DIAL (202) 945-6986
WLFISHMAN@SWIDLAW.COM

NEW YORK OFFICE
919 THIRD AVENUE
NEW YORK, NY 10022-9998
(212) 758-9500 FAX (212) 758-9526

March 17, 1999

By Messenger

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Re: GTE-Bell Atlantic Merger, CC Docket No. 98-184

Dear Ms. Salas:

Please place the attached letter to Thomas Krattenmaker in the public record for the above-referenced proceeding.

For your convenience, an original and twelve copies of this filing are enclosed. Please date stamp the enclosed extra copy of this filing and return it in the attached self-addressed envelope.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to call me.

Sincerely,

William L. Fishman

Enclosures

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SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

WASHINGTON OFFICE
3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202) 424-7500
FACSIMILE (202) 424-7647

NEW YORK OFFICE
919 THIRD AVENUE
NEW YORK, NY 10022-9998
TELEPHONE (212) 758-9500
FACSIMILE (212) 758-9526

March 17, 1999

Mr. Thomas Krattenmaker
Federal Communications Commission
1919 M St., N.W., Room 822
Washington, D.C. 20554

Re: GTE-Bell Atlantic Application for Merger, CC Docket No. 98-184

Dear Mr. Krattenmaker:

RCN Telecom Services, Inc. ("RCN"), a party to the above-described matter, by the undersigned counsel, herewith responds to a letter to you from GTE and Bell Atlantic, dated February 24, 1999, transmitting to you a document entitled "Report of Bell Atlantic and GTE On Long Distance Issues In Connection With Their Merger and Request For Limited Interim Relief" (referred to herein as the "GTE/Bell Atlantic Request" or simply the "Request"). It is surprising, to say the least, that GTE and Bell Atlantic would choose to address an issue so crucial to their proposed merger and representing such a significant expansion of the material contained in their initial application, in an informal format such as that represented by the Request. The relief requested, even if it were lawful, surely justifies a more formal filing. Nevertheless, RCN adopts the format used by GTE/Bell Atlantic in commenting on their proposal. RCN is opposed to grant of the relief requested by GTE and Bell Atlantic on the grounds that such relief is barred by the plain language of the Telecommunications Act of 1996, is not in the public interest, and would only exacerbate many of the substantial problems already presented by the proposed merger of two of the largest telephone companies in the country.

I. Background

RCN and numerous other parties commenting on the proposed merger noted that GTE, which is to be merged into Bell Atlantic, currently provides interLATA voice and internet services which Bell Atlantic cannot legally offer until it has fully complied with the provisions of § 271 of the Telecommunications Act of 1996.[1/] Section 271 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("the Act"), 47 U.S.C. § 271, prohibits any Bell operating company (such as Bell Atlantic), including its subsidiaries and other affiliates, from providing interLATA services in any state within its region unless and until the

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[1/] Comments of RCN Telecom Services, Inc., November 23, 1998, at 20-21.

Federal Communications Commission ("FCC") has determined after the required consultation with the affected state commission(s), that the Bell operating company has met the requirements of § 271. As noted by RCN and others, the GTE/Bell Atlantic merger application barely acknowledged this issue, but merely stated that, if Bell Atlantic had not obtained § 271 approval by the time of closing, it would request "any necessary transitional relief from the Commission."[2/] Presumably in response to these comments, and to an inquiry from the Common Carrier Bureau's staff, GTE and Bell Atlantic have now elaborated their views in the Request.

The GTE/Bell Atlantic Request seeks interim relief from the prohibitions of § 271 with respect to existing interLATA voice services currently offered by GTE in Virginia, Pennsylvania, and New York and in respect to GTE's so-called "Internetworking" Internet backbone facilities. GTE and Bell Atlantic recognize that provision of these services by the merged entity prior to receipt of approval under § 271(a) would be contrary to law and therefore elaborate the nature of the interim relief they seek and provide argument in favor of the grant of such relief. For voice services, GTE/Bell Atlantic ask the Commission for a 90 day period following approval of the merger in which GTE may continue to provide interLATA services while its customers migrate to other carriers. The rationale for this request is that it will avoid disruption to GTE's current interLATA customer basis. Request, at 3.

For GTE's Internetworking services, a more elaborate proposal is advanced: that following the achievement by Bell Atlantic of § 271 approval covering at least 25% of its lines, GTE Internetworking be allowed to continue to provide its current backbone and related services for up to two years, while Bell Atlantic seeks to increase the percentage of its lines covered by § 271 approval. GTE/Bell Atlantic also request that this two year exemption be extendable upon application of Bell Atlantic. Request, at 11.[3/]

[2/] Application, at 19.

[3/] GTE/Bell Atlantic do not provide much detail about the facilities or services currently being provided by GTE Internetworking. They indicate that the backbone network currently links POPs in more than 70 cities across the U.S. *See* Request at 4. Undoubtedly many of these are in Bell Atlantic's service area, and undoubtedly a significant amount of traffic originates in that region. Internetworking is headquartered in Cambridge, MA. One can only assume more detailed data has been withheld because they would emphasize the significance of GTE's role in interLATA Internet services within Bell Atlantic's service area.

II. The Relief Requested By GTE/Bell Atlantic Is Not Available Under the Act

While there are numerous deficiencies in the Request, the short answer is that Congress specifically denied the Commission any authority to modify or waive the provisions of § 271, or to exempt carriers from its reach. Section 271(a) thus prohibits Bell Atlantic or any of its affiliates from providing interLATA services in any state within its region until it has received approval from the FCC to do so pursuant to § 271(d)(3). Section 10(d) of the Act specifies that, except for circumstances not relevant here, "the Commission may not forbear from applying the requirements of § 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented." 47 U.S.C. § 160(d). This clear, unequivocal and very specific language is binding on the parties and on the Commission. There is no room for interpretive evasions, postponements, waivers, forbearance, 25% compliance, substantial compliance, temporary extensions or any other approach to defeating the Congressional intent.

Even if this were not, as it is, indisputable and self-evident, the Commission itself has addressed the scope of its authority under § 271 and concluded that it lacks power to alter the statutory requirement of full compliance with that section before interLATA services may be initiated. Describing § 271 as one of the cornerstones of the 1996 Act opening local markets to competition, the Commission has observed that its central importance is reflected in the fact that it and § 251 "are the only two provisions that Congress carved out in limiting the Commission's otherwise broad forbearance authority. . . ."[4/] Similarly, in denying, *inter alia*, Bell Atlantic's request to offer interLATA Internet backbone services, the Commission noted that it lacks statutory authority to forbear from applying § 271 so as to allow Bell Atlantic to build a regional Internet backbone network.[5/] The weakness of GTE/Bell Atlantic's argument in support of the Commission's alleged authority to provide interim exemptions from § 271 could not be more clearly illustrated than by the authorities cited in support of their position.[6/] These cases are

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[4/] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Dkt. No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 C.R.1 at ¶ 73 (1998). *See also Petition for Declaratory Ruling Regarding U.S. West Petitions to Consolidate LATAs in Minnesota and Arizona,* 12 FCC Rcd 4738, 4751 (1997) ("Act expressly prohibits the Commission from abstaining in any way from applying the requirements of § 271 until those requirements have been fully implemented.")

[5/] *See Petition of Bell Atlantic Corp. for Relief from Barriers to Deployment of Advanced Telecommunications Services*, 13 CR 1, ¶¶ 12, 169 (1998).

[6/] Request, p. 3 n. 2.

rooted in wholly unrelated statutory provisions which precede passage of the Act, contain no accompanying ban on Commission forbearance, and involve *de minimis* matters.

The Request claims that GTE Internetworking does not implicate the flat prohibition in § 271(d) because it involves the provision of information services. Request, at 7. GTE/Bell Atlantic note that § 271 addresses only "telecommunications" and under the definitions of telecommunications and information services in the Act, Internetworking must be considered an information services provider.[7/] Citing the *Joint Board's Report to Congress on Universal Service*, which notes that an entity which offers transmission incorporating information services is not offering telecommunications, but information service,[8/] they contend that Internetworking offers an "information service" even though it uses telecommunications to do so.

In the present circumstances, however, this position is untenable because interLATA information services are not excluded from the ambit of § 271. Although the Request is careful not to offer any significant information about the operations or structure of Internetworking, it is indisputable that Internet backbone facilities, *i.e.* fiber optic cable connecting to switches, are correctly categorized as telecommunications. If the addition of some information services to the provision of that backbone transmission plant were all that is necessary to permit a BOC to escape the limitations of § 271, the limitations set forth in that provision could be easily evaded. Contrary to the impression GTE/Bell Atlantic seek to convey, section 271 is not limited to transmission services. Indeed, the Commission itself has specifically concluded that "the term 'interLATA services' encompasses both interLATA information services and interLATA telecommunications services." (footnote omitted).[9/] Further, "interLATA information services are provided via interLATA telecommunications transmissions and, accordingly, fall within the definition of 'interLATA service.'"[10/] In consequence, the term "interLATA services" includes both interLATA telecommunications and interLATA information services and "a BOC may not

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[7/] *See* 47 U.S.C. §§ 153(43) (telecommunications) and 153(20) (information service).

[8/] *Federal State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd 11501 at ¶ 39 (1998).

[9/] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934,* First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, par. 55, (1996) (subsequent history omitted).

[10/] *Id.*, at ¶ 56.

provide in-region interLATA information services until it obtains section 271 authorization." (footnote omitted).[11/]

Nor is the Joint Board's Report to the contrary. As the Joint Board was careful to note, while ISPs themselves provide information services, to the extent any of their underlying inputs constitute interstate telecommunications "we have authority under the 1996 Act to require that the providers of those inputs contribute to federal universal service mechanisms." *Report*, at ¶ 66. Moreover, the "provision of leased lines to Internet service providers . . . constitutes the provision of interstate telecommunications." *Id.* at ¶ 67 (footnote omitted).[12/] GTE/Bell Atlantic do not dispute that GTE itself provides the telecommunications facilities at issue. In light of the fundamental nature of § 271, the addition of an information services component in an advanced services context does not, and cannot, exempt GTE Internetworking, post merger, from the scope of § 271.[13/]

Nor is GTE/Bell Atlantic's argument that GTE Internetworking is merely incidental to interLATA service persuasive. Request, at 6-7. As defined in § 271(g) of the Act, the only incidental service which is even remotely similar to GTE Internetworking is the use of interLATA facilities for the storage or retrieval of data. *See* 47 U.S.C. sec. 271(g)(4). But GTE/Bell Atlantic make no claim that the Internet services or facilities which are the subject of the Request are limited to such narrow services. Moreover, § 271(h) specifies that the exceptions set forth in § 271(g) to the broad ban on a former BOC offering interLATA services prior to receipt of § 271 authority are to be narrowly construed.

For the same reason, the suggested creation of a single new LATA expressly to accommodate GTE's Internetworking services prior to Bell Atlantic's receipt of full § 271 approval is unavailing. This is just a mechanistic and obvious attempt to end-run the flat prohibition set forth in § 271. To be sure, Congress granted the FCC discretion to approve BOC-established or modified LATAs.[14/] But this grant of authority may not be interpreted, and has not

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[11/] *Id.*, at ¶ 57.

[12/] The Report also notes that in those cases where an Internet service provider owns transmission facilities and engages in data transport over those facilities a universal service contribution is not currently required but "[w]e believe it is appropriate to reexamine that result. One could argue that in such a case the Internet service provider is furnishing raw transmission capacity to itself." *Id.* at ¶ 69 (footnote omitted).

[13/] See *Petition of Bell Atlantic Corp., supra,* n. 5, at ¶ 69 and n. 136.

[14/] 47 U.S.C. 153(25)(B).

been interpreted, to render nugatory the provision in § 160(d) which denies the Commission authority to forebear from enforcing the provisions of § 271 of the Act. GTE/Bell Atlantic cite *Deployment of Wireline Services Offering Advanced Telecommunications Capability* for the Commission's tentative conclusion that modifications of rural LATA boundaries for the purpose of facilitating high-speed access to the Internet would further Congress's goal of ensuring deployment of advanced service to all Americans.[15/] The citation is accurate so far as it goes but GTE/Bell Atlantic fail to note that the tentative conclusion on which they rely relates to targeted LATA alterations and appears in a Further Notice of Proposed Rulemaking, not in the main text which is a Report and Order. In that Report and Order the Commission rejected the BOCs' request to create large-scale LATAs for packet-switched services.[16/] "Such far-reaching and unprecedented relief," the Commission notes, "could effectively eviscerate § 271 and circumvent ... procompetitive incentives... ."[17/] Moreover, a "global 'data LATA'" is functionally no different than forbearance. Adopting the BOCs' suggestion of such a LATA "would exalt form over substance... . "[18/] It would appear, therefore, that GTE/Bell Atlantic's request for a special, universal LATA for GTE's Internetworking merely repeats a suggestion which has already been flatly rejected by the Commission.

GTE/Bell Atlantic further contend that because the Internet does not resemble traditional POTS or circuit switched interexchange networks, it should not be made to conform to LATA configurations. Request, at 5. The Commission, however, has already flatly foreclosed this argument as a matter of law in declining BOC requests for interLATA authority for advanced services: "Congress made clear that the 1996 Act is technologically neutral."[19/] In addition, there are logical weaknesses in this argument. First, the LATA boundaries are designed to set forth geographic areas of BOC concentration, not the nature of facilities or services. Second, even if the technical differences between the IP-based Internet and circuit-switched networks were somehow significant to the policy issues presented, GTE/Bell Atlantic has not even attempted to make, let alone succeeded in making, such a showing. Finally, if there were valid technology-

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[15/] Request at 9, n. 11.

[16/] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 CR 1, ¶ 81 (1998).

[17/] *Id.*, ¶ 82.

[18/] *Id.*

[19/] *Advanced Telecommunications Services, supra*, n. 4, at ¶ 11.

based distinctions in LATA design they are just as logically supportive of a tight rein on BOC provision of Internet service as of a loosening of the LATA boundaries.[20/]

III. Even If The Interim Relief Requested By GTE/Bell Atlantic Were Within The FCC's Power to Grant, GTE/Bell Atlantic Have Failed to Demonstrate That Doing So Would Serve the Public Interest

Any substantive assessment of the GTE/Bell Atlantic Request should reflect the Commission's earlier finding that the burden of proof in seeking any form of authority under § 271 rests squarely on the applicant.[21/] The Request argues that grant of the interim relief requested will avoid disruption to existing customers, assure that GTE remains a meaningful competitor in the Internet market, and would be consistent with Bell Atlantic's efforts to secure § 271 authority. None of these points is compelling, however, and it is clear that the interests with which GTE/Bell Atlantic are most concerned are their own, not those of their customers. As to the avoidance of disruption to existing customers, nothing prevents GTE/Bell Atlantic today, or indeed over the months which have elapsed since the filing of its application from initiating and completing appropriate arrangements. The IXC and Internet backbone/ISP markets are robustly competitive and, in light of the likely delay of some additional months in final action on the GTE/Bell Atlantic merger application, there has been and remains ample time to make suitable alternative arrangements.

The fact is that when GTE/Bell Atlantic filed their merger application they addressed the § 271 issues only in passing and in the vaguest of terms. If GTE/Bell Atlantic had given the issue any serious thought at that time it was not evident in their filing. There is nothing in the

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[20/] To illustrate, GTE/Bell Atlantic argue that the state of Internet backbone competition "remains precarious," Request at 5, presumably because there are only "the big three" and GTE with its 6% of the market. If that market constitutes "precarious competition," the Commission should be reluctant to allow the GTE/Bell Atlantic giant, with its near-total dominance of the local exchange and exchange access markets within Bell Atlantic's service area, to participate in the Internet backbone market. Moreover, one is tempted to ask what share of the local exchange and exchange access market Bell Atlantic currently enjoys within its service area, and whether that number, which is undoubtedly far larger than the share of the Internet backbone market held by any of the existing competitors, demonstrates that competition in those markets is "precarious." If so, given the applicants' anti-competitive records, the merger should not be approved in the first place, mooting the question of interim relief sought by GTE/Bell Atlantic.

[21/] *Ameritech Michigan Application Pursuant to Section 271 to Provide In-Region, InterLATA Services*, 9 CR 267 at ¶ 43 (1997).

Request which could not have been presented to the Commission when the application was first filed. Now that the issue is deemed worthy of more careful consideration by the applicants, GTE/Bell Atlantic rely on the disruption or inconvenience which GTE's interLATA customers would suffer if they were forced to seek other arrangements. However, to have done nothing over a period of many months, when a substantial question of the availability of interim relief existed, is irresponsible. Such irresponsibility cannot be laid at the Commission's doorstep with a plea for a jerry-rigged solution.

The Request's assertion that grant of interim relief is appropriate because "the local market in New York is unquestionably and irreversibly open to competition" is premature, hopelessly self-serving, and incorrect.[22/] If in fact Bell Atlantic meets the criteria for section 271 approval it should file a section 271 petition, rather than improperly asking the FCC to circumvent the section 271 procedures by seeking the same relief but characterizing it as a LATA modification. However many CLEC lines, interconnect agreements and minutes of use may exist in a macroscopic view of the New York market, RCN has noted numerous areas of interaction with Bell Atlantic where the latter has not fulfilled its § 251 obligations.[23/] The New York State Commission has not rendered its opinion on Bell Atlantic's compliance with § 251, and even if it were to do so affirmatively, the FCC is not bound to accept that view, but is free to carry out its own investigation.[24/] Furthermore, while GTE/Bell Atlantic assert that Bell Atlantic has "fully implemented" the competitive checklist -- an assertion which RCN disputes--a BOC's compliance with the competitive checklist in § 271 is not by itself evidence that the public interest would be served by grant of the application.

Equally unimpressive is the Request's assertion that grant of the interim relief is necessary because GTE – a corporation with 1997 revenues of some $23 billion and 1997 earnings of some $2.7 billion, cannot maintain a competitive position in the Internet marketplace unless it has access to the financial and customer-list resources of Bell Atlantic. As numerous parties have already

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[22/] Request, at 2.

[23/] RCN Comments, at 3-7; Reply Comments at 6-7; Petition for Evidentiary Hearing, at 5, App. A., p. 1. Most recently, in its Comments filed March 8, 1999, concerning Bell Atlantic's Report on Compliance with the Bell Atlantic NYNEX Merger Order Conditions, DA 99-296, File No. AAD 98-24, RCN demonstrated that Bell Atlantic's claims of compliance in regard to the openness of the New York Market are untrue.

[24/] *See Application of BellSouth Corporation, et al. Pursuant to § 271 of the Communications Act of 1934, as amended, To Provide In-Region InterLATA Services in Louisiana*, 11 CR 328, at ¶ 9 (1998).

noted in Comments and Reply Comments, the basic premise of the proposed merger, *i.e.* that these two gigantic corporations need to merge to compete successfully in the national and international marketplace, is totally unproven on this record and no doubt is unprovable.

The Request's final argument for grant of the interim relief is that doing so enhances Bell Atlantic's incentives to open its local markets to competition. Request, at 10. The logic of this assertion is difficult to decipher: granting Bell Atlantic partial relief from a statutory provision which was specifically designed by Congress to give it the incentive to open its local market will enhance its incentive to open the local market. To state the proposition is to refute it, wholly apart from the obvious fact that it turns the statute on its head.

IV. Conclusion

The relief sought by GTE and Bell Atlantic in their Request is barred by the provisions of § 271 of the Act and by a number of Commission decisions interpreting that section. As RCN noted in its initial Comments in this proceeding, it is unlawful for GTE to merge into Bell Atlantic while retaining any of its Bell Atlantic-region interLATA activities, whether traditional circuit switched services, or Internet backbone services. Even if the relief were not barred as a matter of law GTE/Bell Atlantic have not met their burden by showing that the public interest requires it be granted. It has been RCN's position that grant of the merger application is not in the public interest because neither GTE nor Bell Atlantic has fulfilled in good faith their obligations under § 251 of the Act. If, nevertheless the Commission concludes that a grant of the proposed merger is appropriate, it should specify in doing so that the merger cannot lawfully be consummated until GTE has divested itself fully of any assets or activities with which Bell Atlantic cannot currently be associated under the Act.

Respectfully submitted,

RCN Telecom Services, Inc.

By: 

Russell Blau
William L. Fishman
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116
(202) 945-6986

March 17, 1999

Its Counsel

CERTIFICATE OF SERVICE

I, Sharon Gantt, hereby certify that on this 17th day of March, 1999, I served a copy of the foregoing letter to Thomas Krattenmaker, CC Docket No. 98-184, on the following parties listed below via messenger or, if marked with an asterisk, by first class postage-paid U.S. mail:

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, N.W.
Washington, D.C. 20554

International Transcription Services
1231 20th Street, N.W.,
Washington, D.C. 20036

Janice Myles
Federal Communications Commission
Policy and Program Planning Division
Common Carrier Bureau
1919 M Street, N.W.,
Room 544
Washington, D.C. 20554

Michael Kende
Federal Communications Commission
Policy and Program Planning Division
Common Carrier Bureau
1919 M Street, N.W.,
Room 544
Washington, D.C. 20554

To-Quyen Truong
Federal Communications Commission
Policy and Program Planning Division
Common Carrier Bureau
1919 M Street, N.W.,
Room 544
Washington, D.C. 20554

Chief International Bureau
2000 M Street, N.W.,
Room 800
Washington, D.C. 20554

Jeanine Poltronieri
Wireless Telecommunications Bureau
2025 M Street, N.W.,
Room 5002
Washington, D.C. 20554

Chief Commercial Wireless Division
2100 M Street, N.W.
Room 7023
Washington, D.C. 20554

Cecilia Stephens
Common Carrier Bureau
Policy and Program Planning Division
Federal Communications Commission
1919 M Street, N.W.,
Room 544
Washington, D.C. 20554

William P. Barr, Esq. *
Executive Vice President-Government and
Regulatory Advocacy and General Counsel
GTE Corporation
One Stamford Forum
Stamford, Connecticut 06904

James R. Young, Esq.*
Executive Vice President - General Counsel
Bell Atlantic Corporation
1095 Avenue of the Americas
New York, New York 10036

Mark Buechele, Esq.*
David Dimlich, Esq.
Supra Telecommunications & Information Systems, Inc.
2620 S.W. 27th Avenue
Miami, Florida 33133

Philip L. Verveer*
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036

Maureen Lewis*
General Counsel
The Alliance for Public Technology
901 Fifteenth Street, N.W., Suite 230
Washington, D.C. 20005

John Vitale*
Managing Director
Bear Stearns & Co. Inc.
245 Park Avenue
New York, New York 10167

Thomas K. Crowe*
Elizabeth Holowinski
Law Offices of Thomas K. Crowe, PC
2300 M Street, N.W.
Suite 800
Washington, D.C. 20037

Debbie Goldman*
George Kohl
501 Third Street, N.W.
Washington, D.C. 20001

James L. Gattuso*
Vice President for Policy and Management
Competitive Enterprise Institute
Suite 1250
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

Patricia A. Stowell*
Public Advocate
Division of Public Advocate
820 N. French Street, 4th Floor
Wilmington, Delware 19801

Charles W. Totto*
Department of Commerce and Consumer Affairs
State of Hawaii
250 S. King Street, Suite 825
Honolulu, Hawaii 96813

Gene Kimmelman*
Co-Director
Consumer Union
Suite 310
1666 Connecticut Avenue, N.W.
Washington, D.C. 20009

Dr. Mark Cooper*
Research Director
Consumer Federation of America
1424 16th Street, N.W., Suite 604
Washington, D.C. 20036

Martin O'Riordan*
Director, Worldwide Telecommunications
EMC Corporation
171 South Street
Hopkinton, MA 01748-9103

Riley M. Murphy*
James F. Falvey
E.Spire Communications, Inc.
133 National Business Parkway, Suite 200
Annapolis Junction, Maryland 20701

Brad E. Mutschelknaus*
Andrea D. Pruitt
Kelley Drye & Warren, LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036

Sandy Ibaugh*
Director of Telecommunications
Indiana Utility Regulatory Commission
302 W. Washington Street, Rm E306
Indianapolis, IN 46204

J.J. Barry *
International President
International Brotherhood of Electrical Workers
1125 Fifteenth Street, N.W.
Washington, D.C. 20005

Angela D. Ledford*
Executive Director
Keep America Connected
P.O. Box 27911
Washington, D.C. 20005

Linda F. Golodner*
President
National Consumers League
1701 K Street, N.W., Suite 1200
Washington, D.C. 20006

Todd McCracken*
President
National Small Business United
1156 15th Street, N.W., Suite 1100
Washington, D.C. 20005-1711

Irvin W. Maloney*
Board Director
Occidental Petroleum Corp
1640 Stonehedge Road
Palm Springs, CA 92264

Scott Blake Harris*
Jonathan B. Mirsky
Harris, Wiltshire & Grannis Llp
1200 Eighteenth Street, N.W.
Washington, D.C. 20036

Charles Hunter*
Catherine M. Hannan
Hunter Communications Law Group
1620 I Street, N.W., Suite 701
Washington, D.C. 20006

Leonard J. Kennedy*
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036-6802

Alan Y. Naftalin*
Koteen& Naftalin, LLP
1150 Connecticut Avenue
Washington, D.C. 20036

Mark C. Rosenblum*
295 North Maple Avenue
Basking Ridge, NJ 07920

Robert J. Aamoth*
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036

Genevieve Morelli*
The Competitive Telecommunications Association
1900 M Street, N.W., Suite 800
Washington, D.C. 20036

Cherie R. Kiser*
Mintz Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Avenue, N.W., Suite 900
Washington, D.C. 210004-2608

David Ellen, Esq*.
Cablevision Systems Corp.
One Media Crossways
Woodbury, New York 11797

Thomas A. Hart, Jr.
Shook, Hardy & Bacon
1850 K Street, N.W.
Suite 900
Washington, D.C. 20006-2244

Lisa B. Smith
R. Dale Dixon, Jr.
MCI WorldCom, Inc.
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

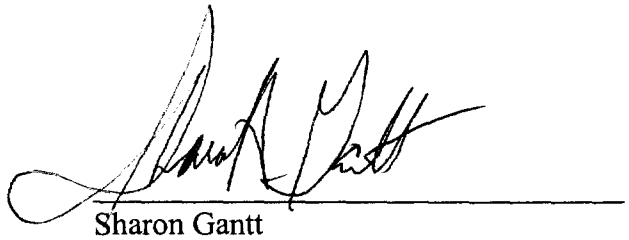
David N,. Porter
Richard S.Whitt
MCI WorldCom, Inc.
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

Anthony C. Epstein
John B. Morris, Jr.
Stuart M. Rennert
Jenner & Block
601 Thirteenth Street, N.W.
Washington, D.C. 2005

Walter Fields
N.J. Coalition for Local Telephone
Competition
P.O. Box 8127
Trenton, New Jersey 08650

Pam Whittington
Assistant Director
Office of Policy Development
Public Utility Commission of Texas
1701 N. Congress Avenue
P.O. Box 13326
Austin, Texas 78711-3326

Judith D. O'Neill
Thelen Reid & Priest LLP
Market Square, Suite 800
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2608



Sharon Gantt

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